Case No. 48723-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY JUVENILE DETENTION OFFICERS' GUILD,

Respondents

v.

KITSAP COUNTY,

Appellant.

RESPONDENT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

Cases

Administrative Decisions

RCW

WAC

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The matter before this court is whether the Commission made legal errors. Although in general, Washington State Courts grant deference to PERC's expertise in this area of law, our State Supreme Court has said, unambiguously, that "if the agency erroneously interpreted or applied the law" then the Courts are the final arbiter of the law under the error of law standard.[1] Under this standard, "the court may substitute its interpretation of the law for that of PERC."[2]

The County continues to misunderstand the Administrative Procedures Act ("APA"), which empowers courts to grant relief when an administrative agency fails to properly apply the law and the prescribed procedures. First, the County ignores that the "totality of the circumstances" standard, by design, considers the totality of numerous minor violations, which taken together amount to bad faith bargaining. The County also misunderstands the nature of the "substantial evidence" standard, ignoring that here, the Commission engaged in a *de novo* review of the *factual* record, without explanation. In such misapplications of the law, the APA states that reviewing courts "shall" provide relief.[3] Lastly, the County misunderstands the nature of its own burden before the Commission, which is to demonstrate why substantial evidence did not support the Examiner's

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[1] *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 458 (1997) (internal citations omitted).
[2] *Id.*
[3] *See* RCW 34.05.570(3)(c) ("The court shall grant relief from an agency order...if it determines that... The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure.").

factual determinations. The Commission's willingness to take on the role of a derelict advocate runs contrary to the agency's established rules and case precedent and constitutes reversible error under the APA.

Setting aside the County's arguments, any one of the Commission's myriad of legal errors is sufficient grounds for this Court to vacate the Commission's Order and reinstate the Hearing Examiner's original Order.

II. ARGUMENT

A. The County Misunderstands and Misapplies the Totality of the Circumstances Standard

The County objects that the Guild is attempting to "shoehorn every allegation of bad faith bargaining into its contention that the Employer representatives lacked authority to meaningfully negotiate." The County apparently misunderstands the meaning of "totality of the circumstances."[4] A review of the various minor acts of bad faith bargaining is what is specifically contemplated by the "totality of the circumstances" test. Under this standard,

> a party may violate its duty to bargain in good faith either by one per se violation, such as refusal to make counter proposals, or through **a series of questionable acts which when examined as a whole demonstrate a lack of good faith bargaining**, but by themselves would not be a per se violation.[5]

The County refused to bargain in good faith across four mandatory subjects of bargaining – the grievance procedure; language on overtime

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[4] Response at 10-11.
[5] *Snohomish County*, Decision 9834-B (PECB, 2008) (emphasis added).

rules; a provision on nondiscrimination – and the County's refusal to meet at reasonable times, constitutes bad faith bargaining under the totality of the circumstances.

The County's bargaining team proposed cutting contractual overtime,[6] even though the Board of County Commissioners had recently amended the personnel manual so that non-represented employees could enjoy contractual overtime.[7] The County's bargaining team stated they were utterly unware of the Commissioners' resolution and would have to investigate before the team could respond to the Guild.[8] But a bargaining team "must have *actual authority* to reach tentative agreements, not tentative authority to reach actual agreements....the employer must provide its bargaining team with the authority to consider different proposals and to make commitments"[9]

The Guild presented a proposal prohibiting discrimination against its membership within designated protected classifications, and the County's team indicated that it had no opposition to the Guild's language. The Guild then sought a tentative agreement on the proposal, but the County indicated it was not able to do that at the time and had to consult with other officials not at the table. Recall that good faith bargaining requires "[t]he team must have actual authority to reach tentative agreements...."[10]

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[6] AR 258-59 (Tr 45: 25 - 46: 1-2).
[7] AR 588-89 (Ex. 7).
[8] AR 261-62 (Tr. 48: 6-8 – 49: 1-3).
[9] *Snohomish County*, Decision 9834 (PECB, 2007) (emphasis added).
[10] *Id.*

The County proposed creating different classes of grievances and sought to prohibit certain grievances from moving beyond the review of Superior Court judges. The Guild asked clarifying questions to ensure it was properly understanding the County's proposal, but the bargaining team indicated the Guild would need to ask its questions in writing so that the County's legal team could provide a response. Even then, the County's bargaining team refused to explain its rationale with the Guild, [11] because the individual "wasn't aware" he was "obligated to."[12] The County's actions show a complete disregard for its duty to "explain [its] proposals and provide [its] reasoning in a manner designed to permit the other party to counter propose language that may be accepted."[13] Explaining the underlying reasoning is "[i]ntegral to the good faith collective bargaining process" because explaining the proposals and the underlying reasoning ensures "their rationale may be properly understood and new proposals may be formulated."[14]

During a three-hour scheduled bargaining meeting, the County's bargaining team decided to leave after only one hour. By unilaterally ending the meeting, the Examiner found the employer "effectively hamstrung its bargaining team at the table."

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[11] AR 399 (Tr. 186: 8-19).
[12] AR 400 (Tr. 187: 9).
[13] *Snohomish County*, Decision 9834 (PECB, 2007) (*citing Fort Vancouver* Regional *Library,* Decision 2350-C (PECB, 1988)).
[14] *Id.*

The County's actions here are the very definition of "a series of questionable acts which when examined as a whole demonstrate a lack of good faith bargaining, but by themselves would not be a per se violation."[15] The County's actions "created a context of bad faith to such a degree that its position on specific items cannot be evaluated in isolation."[16] The County's representatives' inability to enter into tentative agreements, explain proposals, and decisions to unilaterally terminate meetings hamstrung the negotiations to a point of bad faith and in violation of RCW 41.56.140(4) and (1).

In addition, Kitsap County now attempts to reframe its admitted errors as virtues and faults the Guild for not better compensating for the employer's under-preparedness. For example, the County argues that Mr. Conill's unfamiliarity with a recent resolution demonstrates good faith bargaining" because a County representative "honestly admitted he did not know of the recent resolution" and then investigated accordingly.[17] Implicit in this argument is the notion that the Guild is responsible for informing the employer's representative what he needs to know, which is an absurd proposition. Simply because the County's representative was "honest" about not knowing something does not absolve the County of this bad faith behavior. Kitsap County similarly faults the Guild for not defining terms in the County's own proposal, such as its use of the word "binding" in the

[15] *Snohomish County*, Decision 9834-B (PECB, 2008).
[16] *Shelton School District*, Decision 579-B (PECB, 1984).
[17] *Response*, 26.

grievance procedure.[18] It argues that as an attorney, Mr. Casillas should have been able to define the employer's own contract terms and inform the employer what it means in its proposals.[19] But it is simply not the role of the Guild's attorney to explain to the employer what the employer's own terms mean – indeed, such a system would not be fair to either party. The fact that the Guild chose to bring an attorney to the bargaining table does not somehow exempt the County from being able to explain the meaning and rationale behind its proposals.

B. The County Misunderstands and Misapplies the Standards of Review.

1. The County Misunderstands the Substantial Evidence Standard.

The County attempts to reframe the Guild's appeal as a challenge to the Commission's facts.[20] Essentially, the County misreads the Guild's brief as alleging that the Commission's facts are not supported by substantial evidence. In reality, the Guild is asserting that the Commission *failed to follow its own procedures*, and this failure is a basis for vacating the Commission's decision under the APA.

This Court has no duty to defer to the agency's determination in this matter when that decision contained legal errors and failed to adhere to the agency's own rules and decision-making process. The County's attempt at misdirection here should be rejected. While the courts will generally defer

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[18] *Response*, 30-31, 37.
[19] *Response*, 30-31.
[20] *See* Response, 12-13.

to the agency's determinations, there is no deference owed when the decision itself is based on a misapplication of the law, involves an unlawful decision-making process, or otherwise fails to follow prescribed procedures. Those are the issues relevant on this appeal.

The County asserts that "[b]ecause PERC is entitled to substitute its findings for those of the hearing examiner, it is the PERC findings that are relevant on appeal."[21] The County also argues that this Court should review the Commission's fact findings deferentially.[22] This argument misses the point. This appeal is not about reviewing the Commission's facts. It is about a legal issue – as a *legal* matter, the Commission must follow its own established procedures. One of these established procedures is to apply the correct standard of review when assessing the factual determinations made by the Hearing Examiner. Whether or not the Commission correctly applied the standard of review is a legal question. This court reviews legal questions *de novo*.[23]

While it is certainly true that the Commission may replace the Examiner's fact findings, this flows from an assumption that the Commission has first properly analyzed the Examiner's findings: "The APA describes the procedures by which agencies are to conduct internal review of the adjudicative decisions of the lower officials in RCW 34.05.464.

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[21] Response, 12 (quoting *Yakima Police Patrolmen's Ass'n v. City of Yakim*a, 153 Wn. App. 541, 553, 222 P.3d 1217, 1224 (2009)).
[22] Response, 12-13.
[23] *Yakima Police Patrolmen's Ass'n* 153 Wn. App. at 552 (citing *Premera v. Kreidler*, 133 Wn. App. 23, 31, 131 P.3d 930 (2006)); *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 458 (1997) ("Under the error of law standard, the court may substitute its interpretation of the law for that of PERC.")

Thereunder, agency heads can substitute their own findings for those made by the hearing officers."[24] The County ignores this requirement. The APA plainly states that this Court "shall" grant relief from an agency order if this Court determines that "[t]he agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure."[25]

Our State Supreme Court has explained that under the substantial evidence standard, "if the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently."[26] PERC has stated it applies the same substantial evidence standards that Washington courts apply when considering administrative agency decisions: "On appeal, Washington courts look for substantial evidence to support the findings made by administrative agencies... We similarly review the findings of fact issued by our examiners, to determine whether they are supported by substantial evidence and, if so, whether the findings of fact in turn support the examiner's conclusions of law."[27] PERC has clearly stated, "This

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[24] *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 844, 894 P.2d 1352, 1356 (1995).
[25] RCW 34.05.570(3)(c). The County disputes this, apparently asserting that this Court may only review legal conclusions in cases of primary jurisdiction. Response, 13. While the Guild cited *State ex. Rel Graham v. Northshore Sch. Dist.*, 99 Wn.2d 232, 662 P.2d 38 (1983), it was for the broader proposition that "[i]t is a quantum leap in logic, however...[to assume] PERC is the exclusive decider of public labor law questions." *Id.* at 240. Plainly, despite PERC's expertise in the collective bargaining statutes, courts may nevertheless review PERC's legal conclusions. Otherwise, the APA's commandment that courts "shall" review is meaningless. *See* RCW 34.05.570(3).
[26] *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369, 372 (2003) (*citing Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 314 P.2d 622 (1957)).
[27] *Renton Technical College*, Decision 7441-A (CCOL, 2002); *see also C-TRAN,* Decision 7087-B and 7088-B (PECB, 2002); *King County*, Decision 7104-A (PECB, 2001).

Commission does not conduct a de novo review of examiner decisions in unfair labor practice proceedings under Chapter 391-45 WAC."[28] In eschewing de novo review, "[t]he Commission attaches considerable weight to the factual findings and inferences therefrom made by our examiners."[29] "The rule is based upon the notion that the trier of fact is in the best position to decide factual issues."[30]

Even a cursory examination of the Commission's decision shows clearly that it did not perform substantial evidence review. When an appellate court reviews a trial court's fact-findings for substantial evidence, that court discusses the fact findings found by the lower court and notes the evidence supporting it. Consider *Yakima Police Patrolmen's Ass'n v. City of Yakima*, as an example of this Court applying a substantial evidence standard.[31] This Court noted and discussed each of PERC's fact findings and the evidence supporting it. This Court also described how the Commission reviewed the Examiner's findings for substantial evidence.[32] PERC's own case law presents numerous examples of thorough substantial evidence review.[33]

The Commission here did not adhere to its procedures and standard of review. It plainly did not discuss the facts found by the Examiner and

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[28] Clover Park Technical College, Decision 8534-A (PECB, 2004).
[29] *Renton Technical College*, Decision 7441-A (CCOL, 2002).
[30] *King County*, Decision 7104-A (PECB, 2001).
[31] 153 Wn. App. 541 (2009).
[32] *Id.* at 556 (describing PERC's description of the Examiner's findings, how PERC observed there was evidence directly contradicting this finding, and how PERC therefore concluded the finding was not supported by substantial evidence.)
[33] *See, e.g., King County*, Decision 7104-A (PECB, 2001) (analyzing the record to explicitly determine whether substantial evidence supports each contested fact finding).

note the evidence supporting or not supporting those facts. In the Commission's "Analysis" section, the Commission includes 46 different footnotes which are all citations to the original record. The footnotes make *not a single mention of any findings or determinations made by the Examiner*, except footnote 11 where the Commission asserts the examiner did not enter a specific credibility determination on a particular piece of testimony. This dearth of discussion about evidence supporting the Examiner's findings demonstrates that the Commission took it upon itself to review the entire record anew, and create its own factual determinations without deference. Comparing the analysis in this case and the analysis performed in *City of Yakima* demonstrates clearly that the Commission did not apply the substantial evidence standard.

The County similarly asserts that there "is little substantive difference in the Hearing Examiner's Findings and the Commission's Finding."[34] This argument by the County fails for two reasons. Factually, even the County acknowledges there is some "difference" between the factual findings. Even minor changes would necessitate the Commission to articulate why substantial evidence did not support the Examiner's original findings such that the substitution of a new set of facts was warranted. Second, logically, it begs the question as to why the Commission would vacate and then generate an almost entirely new set of factual determinations if it were simply reiterating the same facts found by the

[34] Response, 16.

Examiner. Clearly, the Commission felt there to be a need to vacate most of the Examiner's factual findings and write a new set of factual determinations. The only reason to do that, logically, is because there was some belief that the Examiner missed or misdescribed what the Commission felt were the relevant facts. Thus, the County's efforts to minimize this significant procedural irregularity in what the Commission did here should be rejected.

The County asserts that, "[t]he Commission looked at the same evidence under the totality of the circumstances and concluded the Employer had not engaged in bad faith bargaining."[35] Not only does this misstate the relevant standard – the Commission should be examining the Examiner's findings for substantial evidence, not examining "the same evidence" to reach its own conclusions – it is also a completely separate inquiry from the legal matter on appeal. If this Court holds that the Commission did not follow its own rules and procedures, it could remand the matter back to PERC to review the Examiner's findings according to the substantial evidence standard. Depending on the outcome of that appropriate level of review, the Commission would then be at a point of assessing if the underlying facts supported the Examiner's original legal conclusion that the County engaged in bad faith bargaining. At that point, the County's arguments would be relevant. In the instant appeal, they amount to misdirection.

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[35] Response, 18.

In the alternative, if this Court holds that the Commission correctly applied its procedure and the standard of review, it must then examine the Commission's own fact findings for substantial evidence -- the posture the County adopts. Even under this standard, substantial evidence does not support the Commission's new facts, as there is simply too much evidence on the record that the Commission overlooked. As a particularly egregious example, in commenting on why it believed the employer's actions around the grievance procedure were not in bad faith, the Commission noted the employer was "simply proposing language from the existing collective bargaining agreement."[36] But, the Guild and County had never been party to a CBA before, so there was no "existing" agreement.[37] The Commission's decision is replete with similarly overlooked evidence.[38]

The Commission did not apply the appropriate standard of review – it made no attempt to analyze the Examiner's fact findings for substantial evidence. Instead, the Commission undertook a *de novo* fact finding expedition. This error of law is not entitled to deference from this Court. Even if this Court holds that the Commission did apply the appropriate standard of review, the Commission's new facts are not supported by substantial evidence.

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[36] *Kitsap County*, Decision 12163-A (PECB, 2015) at 14.
[37] *Kitsap County*, Decision 12163 (PECB, 2014) at 2.
[38] Opening Brief, 40-43.

2. The County misunderstands WAC 391-45-390 and the County's own burden.

A crucial piece of the Commission's standard of review is that the "party assigning error has the burden of showing a challenged finding is in error and not supported by substantial evidence; *otherwise findings are presumed correct.*"[39] The County responds to this by asserting that it listed various errors in its appeal, and that while its appeal brief was rejected, its "post-hearing brief to the hearing examiner was part of the record."[40] This argument blatantly misinterprets the Commission's standard: WAC 391-45-390 specifies that on appeal the Commission is only to consider "the record and any briefs or arguments **submitted to it**" (emphasis added) in ruling on the appeal, which would not include earlier briefing submitted to the hearing examiner. Additionally, the County's earlier briefing to the Examiner could not have contained any argument as to why the Examiner's findings were not supported by substantial evidence, for which there must be a showing, because, sequentially, that brief was submitted before the Examiner had even issued her decision.

The Commission has already addressed an identical situation. In *Cowlitz County*[41] the Commission noted that although the appealing party listed numerous findings of fact in its notice of appeal (just like in this

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[39] *City of Edmonds*, Decision 8798-A (PECB, 2005) ("Unchallenged findings of fact are considered verities on appeal") (*citing Brinnon School District*, Decision 7211-A (PECB, 2001) (*citing Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364 (1990))); *see also Cowlitz County,* Decision 7210-A (PECB, 2001); *Green v. McAllister*, 103 Wn. App. 452 (2000).

[40] Response, 4. *See also* Response, fn. 54.

[41] Decision 7210-A (PECB, 2001).

case), it failed to address those facts in its briefing (just like in this case). The Commission reasoned this omission indicated that the appellant

> appears to agree with those findings or does not argue what part(s) of those findings are in error....**Because the [appellant's] arguments do not show how [those fact findings] are in error, [the appellant] has not met its burden, and we will treat these findings as verities on appeal.**[42]

There is simply no way that the County's original briefing to the Hearing Examiner, presented to the Examiner before the Examiner entered findings, demonstrated how the Examiner's findings were in error. The Commission's handling of this case is squarely in conflict with its earlier decision in *Cowlitz County* and contrary to established agency precedent and decision-making.

In the complete absence of any specific arguments from the County detailing why the Examiner's findings were in error, legally it is not possible for the County to carry the burden of proof imposed on it to have the Examiner's factual determinations set aside. For the agency to take on that role of the advocate should be properly understood as an unlawful procedure and violation of the APA

PERC is required to "maintain an impartial role in all proceedings pending before the agency,"[43] and it is the responsibility of parties to a ULP proceeding to present their own case or defense and satisfy their

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[42] *Cowlitz County*, Decision 7210-A (PECB, 2001) (*citing Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364 (1990)) (emphasis added).
[43] WAC 391-08-630.

respective burdens of proof.[44] In the absence of any argument from the County in support of its appeal demonstrating why the Examiner's findings are not supported by substantial evidence, it is impossible for the County, as the appealing party, to satisfy this burden.

The Commission did not hold the County to its burden, and in so doing, "engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure."[45] In such a circumstance, this court "shall" set aside the Commission's decision.[46] The County's arguments to the contrary fly in the face of both the Commission's previous decisions and WAC 391-45-390.

III. CONCLUSION

Based on the foregoing, the Guild respectfully requests the Commission's Order be vacated and the Hearing Examiner's original Order reinstated.

RESPECTFULLY SUBMITTED this 21st day of September, 2016, at Seattle, WA.

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[44] *See* WAC 391-45-270.
[45] RCW 34.05.570(3)(c).
[46] *Id.*

CERTIFICATE OF SERVICE

I certify that on September 21st, 2016, I caused to be served via Electronic Mail and U.S. Mail true and accurate copies of the foregoing RESPONDENT'S OPENING BRIEF and this *CERTIFICATE OF SERVICE* on the parties below:

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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of September, 2016, at Seattle, Washington.

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